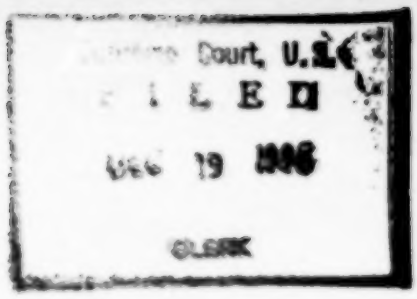

(3)

No. 95-620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ACTION FOR CHILDREN'S TELEVISION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY FOR PETITIONERS

TIMOTHY B. DYK
(Counsel of Record)
GREGORY G. KATSAS
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Counsel for Petitioners

[Additional Counsel Listed After Conclusion]

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REPLY FOR PETITIONERS

1. The FCC's brief in opposition is most significant for what it leaves undisputed. *First*, the FCC does not dispute the exceptional importance of the question whether its scheme of indecency regulation is constitutional. As the FCC itself urged four years ago, the constitutionality of broadcast indecency restrictions "warrants this Court's attention" because it is "an issue of concern to virtually every American household." Petition for Certiorari at 21, *FCC v. Action for Children's Television*, No. 91-952 (Dec. 16, 1991). Since 1987, the FCC has issued at least 47 NALs for allegedly indecent broadcasting. Pet. 9 & n.10. The FCC also has announced plans to issue over 100 more, apparently depending on the outcome of current litigation. *See In the Matter of Sagittarius Broadcasting Corp.*, 1995 FCC LEXIS 5924, at *4 (Sept. 5, 1995) (Statement of Chairman Hundt).

Second, the FCC does not attempt to defend the grounds of decision asserted by the court of appeals: that a system of

"informal censorship" within the meaning of *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), is facially constitutional as long as no statute "prevents" prompt judicial review (Pet. App. 15a-16a) and that plaintiffs raising procedural challenges under *Bantam Books* must prove that the speech at issue is substantively protected (Pet. App. 18a-19a). As explained in the petition for certiorari (Pet. 14-17), those holdings squarely conflict with numerous decisions of this Court.

Third, the FCC does not dispute that its enforcement scheme, as a practical matter, has completely foreclosed judicial review of individual indecency forfeitures. Pet. App. 5a.[1] The FCC concedes that the process of administrative adjudication and judicial review consumes between two and seven years, although it could occur within less than 90 days, and that no indecency forfeiture has been reviewed on the merits. Opp. 6, 14 n.7.[2] The FCC also does not dispute that it uses indecency forfeitures to instruct broadcasters how to program their stations and that it threatens them with substantial and escalating penalties unless they comply immediately. Pet. App. 6a, 38a-39a.

Finally, although every judge on the panel below expressed

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[1] As explained in the petition for certiorari (Pet. 8-9), the only circumstances where review has been available are in cases where the FCC has imposed general indecency restrictions by regulation or in extremely rare cases where the FCC has rendered an adjudicatory determination of indecency, but has declined to impose a forfeiture. Neither context affords any opportunity to obtain review of the dozens of indecency determinations rendered in the context of forfeiture orders. Thus, as a practical matter, the FCC's individual enforcement decisions escape review entirely.

[2] The one case cited by the FCC, *United States v. Evergreen Media Corp.*, 832 F. Supp. 1179 (N.D. Ill. 1993), is the only collection action brought by the government since 1987. That case was settled over 18 months after it was filed, and over 6.5 years after the allegedly indecent broadcast at issue, without any judicial determination of the constitutional defenses raised by the broadcaster. *See* Pet. 4-5.

doubts about whether the indecency forfeiture scheme is constitutional,[3] the FCC does not suggest that its current enforcement policies are likely to change. On the contrary, the FCC remarkably argues that its aggressive interim enforcement, without judicial review, is justified because "deterrence of unlawful conduct, even in the area of the First Amendment, is a 'legitimate end' of government." Opp. 11. Moreover, the FCC attempts to place responsibility for the extraordinary delays in judicial review on broadcasters who will not "expedit[e] the enforcement process" by "stipulating to the facts" alleged by the FCC. Opp. 14.[4]

2. Despite these significant concessions, the FCC nonetheless opposes review in this Court. The FCC contends (Opp. 8-9) that there is no case or controversy because petitioner Infinity Broadcasting Corporation recently settled all of its pending cases and because the district court dismissed the other petitioners from the case. The FCC argues that because there are no longer "pending" enforcement proceedings, Infinity "is no longer suffering any concrete, imminent injury resulting from the FCC's enforcement of the broadcast indecency limitations." Opp. 9.

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[3] *E.g.*, Pet. App. 2a, 16a (majority twice characterizing scheme as constitutionally "troubling"); Pet. App. 22a, 24a (concurrence "with reservations" noting "serious problems with the current practice followed by the FCC"); Pet. App. 29a-30a (dissent concluding that FCC's "manipulation of speech without judicial review is unconstitutional").

[4] The FCC suggests that Infinity "affirmatively took steps to delay judicial review" (Opp. 14 n.8) by filing a prompt petition for reconsideration one month after an adverse FCC forfeiture order. *See* Stipulations of Fact, Ex. 3, at 1A, *Action for Children's Television v. FCC*, No. 93-0400 (D.D.C. Mar. 24, 1993) (hereafter "Stipulations"). The FCC took six months to adjudicate the petition. *See id.*; Opp. 14 n.8. In that same case, the FCC took 22 months to issue an NAL (from the date of the complaint), and an additional 23 months to issue the forfeiture. *See* Stipulations, *supra*, Ex. 3, at 1 to 1A.

The FCC cites no case for the proposition that there cannot be a case or controversy absent pending enforcement proceedings. This Court routinely has upheld the standing of plaintiffs to seek prospective relief against *future* enforcement, despite the absence of pending proceedings. *See, e.g., Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979); *Steffel v. Thompson*, 415 U.S. 452, 458-60 (1974); *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968). A requirement of pending proceedings would entail the absurd consequence that federal courts could never afford prospective relief against enforcement by the states, because the existence of pending state proceedings triggers a duty to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. *See, e.g., Trainor v. Hernandez*, 431 U.S. 434, 441-46 (1977). On that view, this Court could not have even decided *Bantam Books*.

A plaintiff may seek prospective relief to prevent future injuries that are neither "conjectural" nor "hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).[5] The FCC has promised continued aggressive enforcement both in its official decisions and in the stipulated record filed in this case. *See, e.g.*, Stipulations, *supra* note 4, at 17; *Notice of Apparent Liability to Infinity Broadcasting Corp.*, 8 FCC Rcd 6740, 6741 (1993). Infinity alone has been the subject of five enforcement proceedings where the forfeitures totalled over $1.7 million. Pet. 6-7. The FCC's activity clearly establishes a case or controversy as to future enforcement.

Throughout this litigation, broadcasters including Infinity have claimed standing not only because of pending proceedings, but

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[5] The injury must be traceable to the defendant and redressable by a favorable decision on the merits. *See Defenders of Wildlife*, 504 U.S. at 561. The FCC does not dispute that these requirements are satisfied here.

also because of a credible threat of future enforcement.[6] As a prevailing party with respect to standing, Infinity could not have sought review to challenge the reasoning of the courts below on that point. *See, e.g., Public Service Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939). At a minimum, Infinity may continue to assert the possibility of future enforcement as a proper, and properly preserved, ground for standing in this Court. *See, e.g., Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.19 (1979).[7]

3. The absence of a conflict among the circuits does not argue against review.

a. As noted above, the FCC does not dispute the exceptional importance of the question presented. This Court has granted review in the past, despite the absence of a circuit conflict, to consider important questions about the scope of the FCC's power to regulate indecent broadcasting. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Denver Area Telecomm. Consortium, Inc. v. FCC*, 116 S. Ct. 471 (1995) (granting certiorari).

b. This case presents an ideal vehicle for resolving the question. The nineteen petitioners in this case include not only

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[6] *See, e.g.*, Complaint, *Action for Children's Television v. FCC*, No. 93-0400, at 25 (D.D.C. Feb. 24, 1993) (hereafter "Complaint") (requesting court to "order the dismissal of all indecency forfeiture proceedings . . . currently pending" *and* to "enjoin the FCC from initiating or conducting [indecency] forfeiture proceedings"); Brief of Appellants, *Action for Children's Television v. FCC*, No. 93-5178, at 42-44 (D.C. Cir. May 18, 1994) (argument titled "All Broadcasting Plaintiffs Have Alleged Sufficient Article III Injury").

[7] As long as Infinity has standing to litigate the question presented, the standing of the other petitioners is immaterial. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977). The court of appeals recognized this point: after concluding that Infinity has standing, it addressed petitioners' claims on the merits without determining whether the district court had properly dismissed the other petitioners. Pet. App. 12a-14a.

individual broadcasters but also broad-based organizations, such as the National Association of Broadcasters, that represent virtually every interest affected by the FCC indecency enforcement scheme.[8] The record contains a series of stipulations exhaustively chronicling FCC enforcement activities since 1987. Both courts below filed published opinions engaging the constitutional question at some length. And, as noted above, the FCC has made clear that it has no intention of tempering its enforcement activities.

c. Deferring review would significantly harm the First Amendment interests at issue. While the FCC suggests that other broadcasters might "persuade another court of appeals" in the future (Opp. 10), such litigation is unlikely to be commenced because most of the affected parties are already represented here, and new litigation, even if not barred by *res judicata*, would consume several more years. The FCC's alternative suggestion that broadcasters raise constitutional challenges as a defense in enforcement proceedings (Opp. 10) simply urges that they submit to the very scheme they contend is unconstitutional. It also ignores the practical impossibility of obtaining such review.

d. While the court of appeals' specific holding might not directly conflict with the holdings of other circuits, its narrow reading of *Bantam Books* is in considerable tension with various other appellate decisions. *See, e.g.*, *United States v. P.H.E., Inc.*, 965 F.2d 848, 855-56 (10th Cir. 1992) (applying *Bantam Books* to invalidate multiple prosecutions for distribution of

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[8] Petitioners include six broadcasters; two program distributors; eight organizations representing broadcasters, distributors and journalists; and three organizations representing listeners and viewers. *See* Complaint, *supra* note 6, at 3-10. While the FCC presently asserts (and we agree) that broadcasters may raise *Bantam Books* challenges in future cases (Opp. 10), the FCC might resist those challenges by seeking to invoke traditional preclusion doctrines. *Cf.* Restatement (Second) of Judgments § 41(1) (1982) (person "represented by a party" is sometimes bound by judgment).

allegedly obscene material); *Planned Parenthood Federation v. Agency for Int'l Development*, 915 F.2d 59, 64 (2d Cir. 1990) (*Bantam Books* applies to "censorship by means of intimidation"), *cert. denied*, 500 U.S. 952 (1991); *Cruz v. Ferre*, 755 F.2d 1415, 1422 (11th Cir. 1985) (applying *Bantam Books* to invalidate municipality's indecency forfeiture scheme). Review is appropriate to address this "conflict in principle." *Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975).

4. On the merits, the FCC contends primarily that its indecency forfeiture scheme does not constitute a system of "informal censorship" because its orders "are not self-executing," but "tak[e] effect only *after* judicial review occurs." Opp. 12. The FCC completely fails to distinguish the scheme at issue in *Bantam Books*, where the censoring authority could impose no "self-executing" sanction at all, but could merely refer the targeted speakers to the state attorney general for prosecution. *See* 372 U.S. at 66. Nonetheless, as the court of appeals recognized, this Court held that the scheme constituted an impermissible system of "informal censorship" because it had an immediate effect and foreclosed judicial review "as a *practical* matter." Pet. App. 17a (emphasis added).[9]

5. Finally, the FCC contends that petitioners' claims, if successful, "would effectively preclude the Commission" from

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[9] While the FCC notes that statements by FCC Commissioners "do not constitute actions by the Commission itself" (Opp. 15), it does not dispute that this Court considered comparable statements in assessing the practical effect of the enforcement scheme at issue in *Bantam Books*. *See, e.g.*, 372 U.S. at 67. Contrary to the FCC's suggestion (Opp. 15-16), this Court frequently has applied the procedural principles of *Bantam Books* in cases involving primarily civil enforcement. *See, e.g.*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547 (1975); *Blount v. Rizzi*, 400 U.S. 410, 411-12 (1971). The FCC also repeats the various purported distinctions of *Bantam Books* relied upon by the district court and not addressed by the court of appeals. Opp. 16. As explained in the petition for certiorari (Pet. 18-19), those distinctions are insubstantial.

enforcing indecency restrictions. Opp. 16. In fact, however, the claims would impose no substantive restrictions on the permissible scope of indecency regulation, but would simply require an affirmative guarantee of prompt judicial review of FCC indecency determinations. The First Amendment demands no less.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY B. DYK
(Counsel of Record)
GREGORY G. KATSAS
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Petitioners

Of counsel:
HENRY GELLER
1750 K Street, N.W.
8th Floor
Washington, D.C. 20006

ANDREW JAY SCHWARTZMAN
2000 M Street, N.W.
Suite 400
Washington, D.C. 20036

Counsel for Action for Children's Television

MAJORIE HEINS
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, New York 10036

Counsel for Americal Civil Liberties Union Foundation

JAMES POPHAM
1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036

Counsel for Association of Independent Television Stations, Inc.

MOLLY PAUKER
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016

Counsel for Fox Broadcasting Company, Inc.: Fox Television Stations, Inc.; and 20th Century Fox Film Corporation

BARBARA BURNS
2 Kennedy Boulevard
East Brunswick, NJ 08816

Counsel for Greater Media, Inc.

STEVEN A. LERMAN
DENNIS P. CORBETT
LEVENTHAL, SENTER & LERMAN
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006

Counsel for Infinity Broadcasting Corporation; Shamrock Broadcasting, Inc.; and South Fork Broadcasting Corporation

FRITZ E. ATTAWAY
1600 Eye Street, N.W.
Washington, D.C. 20006

Counsel for Motion Picture Association of America, Inc.

HENRY L. BAUMANN
STEVEN A. BOOKSHESTER
1771 N Street, N.W.
Washington, D.C. 20036

Counsel for National Association of Broadcasters

CARY S. TEPPER
BOOTH, FRERET & IMLAY, P.C.
1233 20th Street, N.W.
Suite 204
Washington, D.C. 20036

Counsel for National Association of College Broadcasters

STEPHEN E. NEVAS
DENISE LEARY
635 Massachusetts Ave., N.W.
Washington, D.C. 20001

Counsel for National Public Radio, Inc.

ELLIOT M. MINCBERG
LAWRENCE S. OTTINGER
2000 M Street, N.W.
Suite 400
Washington, D.C. 20036

Counsel for People for the American Way

ROBERT E. BRANSON
3 Constitution Plaza
Hartford, CT 06103

Counsel for Post-Newsweek Stations, Inc.

PAULA A. JAMESON
NANCY H. HENDRY
1320 Braddock Place
Alexandria, Virginia 22314

Counsel for Public Broadcasting Service

J. LAURENT SCHARFF
REED SMITH SHAW & McCLAY
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005

Counsel for Radio-Television News Directors Association

BRUCE W. SANFORD
HENRY S. HOBERMAN
ROBERT D. LYSTAD
BAKER & HOSTETLER
Washington Square, Suite 1100
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

Counsel for Society of Professional Journalists

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